

by an independent, qualified appraiser every thirty months with the rental rate being adjusted accordingly.

Notice to Interested Persons: Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the applicant and Department within 15 days of the date of publication in the **Federal Register**. Comments are due forty-five (45) days after publication of the notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Khalif Ford of the Department, telephone (202) 693-8540 (this is not a toll-free number).

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately

describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 12th day of December, 2003.

Ivan Strasfeld,

*Director of Exemption Determinations,
Employee Benefits Security Administration,
Department of Labor.*

[FR Doc. 03-31102 Filed 12-16-03; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Prohibited Transaction Exemption 2003-36; Exemption Application No. D-11086 et al.]

Grant of Individual Exemptions; Deutsche Bank AG

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of Individual Exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary

of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

Deutsche Bank AG

[Prohibited Transaction Exemption No. 2003-36; Application Nos. D-11086; D-11087; D-11088; D-11089; and D-11090]

Exemption

Section I: Basic Exemption

The restrictions of section 406(a)(1)(A) through (D) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of 4975(c)(1)(A) through (D) of the Code, shall not apply to a transaction between a party in interest with respect to a plan (as defined in section (v)(h)) and such plan, provided that the Deutsche Bank In-house Manager (DBIM) (as defined in section IV(a)) has discretionary authority or control with respect to the plan assets involved in the transaction and the following conditions are satisfied:

(a) The terms of the transaction are negotiated on behalf of the plan by, or under the authority and general direction of, the DBIM, and either the DBIM, or (so long as the DBIM retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by the DBIM, makes the decision on behalf of the plan to enter into the transaction.

Notwithstanding the foregoing, a transaction involving an amount of \$5,000,000 or more, which has been negotiated on behalf of the plan by the DBIM will not fail to meet the requirements of this section I(a) solely because the plan sponsor or its designee retains the right to veto or approve such transaction;

(b) The transaction is not described in—

(1) Prohibited Transaction Exemption 81-6¹ (relating to securities lending arrangements),

(2) Prohibited Transaction Exemption 83-1² (relating to acquisitions by plans of interests in mortgage pools), or

(2) Prohibited Transaction Exemption 88-59³ (relating to certain mortgage financing arrangements);

(c) The transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest;

(d) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of the DBIM, the terms of the transaction are at least as favorable to the plan as the terms generally available in arm's length transactions between unrelated parties;

(e) The party in interest dealing with the plan: (1) Is a party in interest with respect to the plan (including a fiduciary) solely by reason of providing services to the plan, or solely by reason of a relationship to a service provider described in section 3(14)(F), (G), (H), or (I) of the Act; and (2) does not have discretionary authority or control with respect to the investment of the plan assets involved in the transaction and does not render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets;

(f) The party in interest realign with the plan is neither the DBIM nor a person related to the DBIM (within the meaning of section IV(d));

(g) The DBIM adopts written policies and procedures that are designed to assure compliance with the conditions of the exemption;

(h) An independent auditor, who has appropriate technical training or experience and proficiency with ERISA's fiduciary responsibility provisions and so represents in writing, conducts an exemption audit (as defined in section IV(f)) on an annual basis. Following completion of the exemption audit, the auditor shall issue a written report to the plan presenting its specific findings regarding the level of compliance with the policies and procedure adopted by the DBIM in accordance with section I(g); and

(i) In addition to the above:

(1) The DBIM is a bank that has the power to manage, acquire or dispose of assets of a plan, which bank has, as of the last day of its most recent fiscal year, equity capital in excess of \$1,000,000 and is either supervised by a state or federal agency, or by the German

Federal Banking Supervisory Authority, Bundesanstalt für Finanzdienstleistungsaufsicht (BAFin) in cooperation with the Deutsche Bundesbank (Bundesbank);

(2) Prior to entering into any transaction described in the exemption, the DBIM agrees in writing:

(A) To submit to the jurisdiction of the United States;

(B) To appoint an agent for service of process in the United States, which maybe an affiliate (the Process Agent);

(C) To consent to service of process on the Process Agent;

(D) That it may be sued in the United States courts in connection with the transactions described in this proposed exemption;

(E) To comply with, and be subject to, all relevant provisions of the Act; and

(F) That enforcement of any claim arising between a plan(s) and the DBIM, resulting from a transaction described in the exemption, will occur in the United States courts.

Section II: Leasing of Office Space

The restrictions of sections 406(a), 406(b)(1), 406(b)(2) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to:

(a) The leasing of office or commercial space owned by a plan managed by a DBIM to an employer any of whose employees are covered by the plan or an affiliate of such an employer (as defined in section 407(d)(7) of the Act), if—

(1) The plan acquires the office or commercial space subject to an existing lease with an employer, or its affiliate as a result of foreclosure on a mortgage or deed of trust;

(2) The DBIM makes the decision on behalf of the plan to foreclose on the mortgage or deed of trust as part of the exercise of its discretionary authority;

(3) The exemption provided for transactions engaged in with a plan pursuant to section II(a) is effective until the later of the expiration of the lease term or any renewal thereof which does not require the consent of the plan lessor;

(4) The amount of space covered by the lease does not exceed fifteen (15) percent of the rentable space of the office building or the commercial center; and

(5) The requirements of sections I(c), I(g), and I(h) are satisfied with respect to the transaction.

(b) The leasing of residential space by a plan to a party in interest if—

(1) The party in interest leasing space from the plan is an employee of an employer any of whose employees are

covered by the plan or an employee of an affiliate of such employer (as defined in section 407(d)(7) of the Act);

(2) The employee who is leasing space does not have any discretionary authority or control with respect to the investment of the assets involved in the lease transaction and does not render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets;

(3) The employee who is leasing space is not an officer, director, or a ten percent (10%) or more shareholder of the employer or an affiliate of such employer;

(4) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of the DBIM, the terms of the transaction are not less favorable to the plan than the terms afforded by the plan to other, unrelated lessees in comparable arm's length transactions;

(5) The amount of space covered by the lease does not exceed five percent (5%) of the rentable space of the apartment building or multi-unit residential subdivision, and the aggregate amount of space leased to all employees of the employer or an affiliate of such employer does not exceed ten percent (10%) of such rentable space; and

(6) The requirements of section I(a), I(c), I(d), I(g), and I(h) are satisfied with respect to the transaction.

Section III: Places of Public Accommodation

The restrictions of sections 406(a)(1) (A) through (D) and 406(b) (1) and (2) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the furnishing of services and facilities (and goods incidental thereto) by a place of public accommodation owned by a plan and managed by a DBIM to a party in interest with respect to the plan, if the services and facilities (and incidental goods) are furnished on a comparable basis to the general public.

Section IV: Definitions

For the purposes of this exemption:

(a) The term "Deutsche Bank In-house Manager" or "DBIM" means an organization which is—

(1) Deutsche Bank, or a direct or indirect wholly-owned bank or trust company subsidiary of Deutsche Bank, supervised under the laws of the United States, a State, or Germany, that (A) Has the power to manage, acquire, or dispose of assets of a plan, (B) has, as of the last day of its most recent fiscal

¹ 46 FR 7527; January 23, 1981.

² 48 FR 895; January 7, 1983.

³ 53 FR 24811; June 30, 1998.

year, equity capital (*i.e.*, common and preferred stock, surplus, undivided profits, contingency reserves, group contingency reserves, and other capital reserves) in excess of \$1,000,000,⁴ and (C) has as of the last day of its most recent fiscal year under its management and control total assets attributable to plans maintained by affiliates of the DBIM (as defined in section IV(b)) in excess of \$50 million; provided that if it has no prior fiscal year as a separate legal entity as a result of it constituting a division or group within the employer's organizational structure, then this requirement will be deemed met as of the date during its initial fiscal year as a separate legal entity that responsibility for the management of such assets in excess of \$50 million was transferred to it from the employer.

In addition, plans maintained by affiliates of the DBIM and/or the DBIM, must have, as of the last day of each plan's reporting year, aggregate assets of at least \$250 million.

(b) For purposes of section IV(a) and section IV(h), an "affiliate" of a DBIM means a member of either: (1) A controlled group of corporations (as defined in section 414(b)) of the Code of which the DBIM is a member; or (2) a group of trades or businesses under common control (as defined in section 414(c)) of the Code of which the DBIM is a member; provided that "50 percent" shall be substituted for "80 percent" wherever "80 percent" appears in section 414(b) or 414(c) of the Code or the rules thereunder.

(c) The term "party in interest" means a person described in section 3(14) of the Act and includes a "disqualified person" as defined in section 4975(e)(2) of the Code.

(d) A DBIM is "related" to a party in interest for purposes of section I(f) of this exemption if the party in interest (or a person controlling, or controlled by, the party in interest) owns a five percent (5%) or more interest in the DBIM or if the DBIM (or a person controlling, or controlled by, the DBIM) owns a five percent (5%) or more interest in the party in interest. For purposes of this definition:

(1) The term "interest" means with respect to ownership of an entity—

(A) The combined voting power of all classes of stock entitled to vote or the total value of the shares of all classes of stock of the entity if the entity is a corporation.

(B) The capital interest or the profits interest of the entity if the entity is a partnership, or

(C) The beneficial interest of the entity if the entity is a trust or unincorporated enterprise;

(2) A person is considered to own an interest held in any capacity is the person has or shares the authority—

(A) To exercise any voting rights or to direct some other person to exercise the voting rights relating to such interest, or

(B) To dispose or to direct the disposition of such interest; and

(3) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(e) For purposes of this exemption, the time as of which any transaction occurs is the date upon which the transaction is entered into. In addition, in the case of a transaction that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into on or after April 8, 2002, or any renewal that requires the consent of the DBIM occurs on or after April 8, 2002, and the requirements of this exemption are satisfied at the time the transaction is entered into or renewed, the requirements will continue to be satisfied thereafter with respect to the transaction. Nothing in this paragraph shall be construed as exempting a transaction entered into by a plan which becomes a transaction described in section 406 of the Act or section 4975 of the Code while the transaction is continuing, unless the conditions of the exemption were met either at the time the transaction was entered into or at the time the transaction would have become prohibited but for this exemption. In determining compliance with the conditions of the exemption at the time that the transaction was entered into for purposes of the preceding sentence, section I(e) will be deemed satisfied if the transaction was entered into between a plan and a person who was not then a party in interest.

(f) Exemption Audit. An "exemption audit" of a plan must consist of the following:

(1) A review of the written policies and procedures adopted by the DBIM pursuant to Section I(g) for consistency with each of the objective requirements of this exemption (as described in Section IV(g)).

(2) A test of a representative sample of the plan's transactions in order to make findings regarding whether the DBIM is in compliance with (i) the written policies and procedures adopted

by the DBIM pursuant to section I(g) of the exemption and (ii) the objective requirements of the exemption.

(3) A determination as to whether the DBIM has satisfied the definition of a DBIM under the exemption; and

(4) Issuance of a written report describing the steps performed by the auditor during the course of its review and the auditor's findings.

(g) For purposes of section IV(f), the written policies and procedures must describe the following objective requirements of the exemption and the steps adopted by the DBIM to assure compliance with each of these requirements:

(1) The definition of a DBIM in section IV(a).

(2) The requirements of Part I and section I(a) regarding the discretionary authority or control of the DBIM with respect to the plan assets involved in the transaction, in negotiating the terms of the plan to enter into the transaction, and with regard to the decision on behalf of the plan to enter into the transaction.

(3) That any procedure for approval or veto of the transaction meets the requirements of section I(a).

(4) For a transaction described in section I:

(A) that the transaction is not entered into with any person who is excluded from relief under section I(e)(1), section I(e)(2), to the extent such person has discretionary authority or control over the plan assets involved in the transaction, or section I(f), and

(B) that the transaction is not described in any of the class exemptions listed in section I(b).

(5) For a transaction described in Part III:

(A) If the transaction is described in section II(a).

(i) that the transaction is with a party described in section II(a);

(ii) that the transaction occurs under the circumstances described in section II(a)(1) and (2);

(iii) that the transaction does not extend beyond the period of time described in section II(a)(3); and

(iv) that the percentage test in section II(a)(4) has been satisfied or

(B) If the transaction is described in section II(b),

(i) that the transaction is with a party described in section II(b)(1);

(ii) that the transaction is not entered into with any person excluded from relief under section II(b)(2) to the extent such person has discretionary authority or control over the plan assets involved in the lease transaction or section II(b)(3); and

(iii) that the percentage test in section II(b)(5) has been satisfied.

⁴ The condition in Part IV(a) of the proposed exemption that the INHAM have in excess of \$1 million in equity capital mirrors the parallel requirement in Part IV(a) of QPAM, PTE 84-14.

(h) the term “plan” means a plan maintained by the DBIM or an affiliate of the DBIM.

Effective Date of Exemption: The effective date of this exemption is April 8, 2002.

For a more complete statement of the facts and representations supporting the Department’s decision to grant this exemption, refer to the Notice of Proposed Exemption (the Notice) published on March 21, 2003 at 68 FR 13960.

Written Comments

The Department received thirty one written comments and three requests for a public hearing from interested persons in response to the Notice. The Department forwarded copies of the comments to Deutsche Bank and requested that Deutsche Bank address in writing the various concerns raised by the commentators. Many of the comments fell into broad categories to which Deutsche Bank responded collectively. Where a single commentator raised a unique issue, such issue was responded to individually. The comments and Deutsche Bank’s responses are summarized below.

Several commentators questioned whether the proposed exemption reduces or eliminates their benefits under their Deutsche Bank plans. Deutsche Bank responded that the proposed exemptions does not address, much less reduce or eliminate, benefits under the plans.

One commentator asked what safeguards are in place under the proposed exemption. Deutsche Bank responded that protective conditions for the proposed exemption are described in the Notice. Those conditions are essentially the same as the protective conditions found in PTE 96–23, 61 Fed. Reg. 15975 (Apr. 10, 1996), which provides relief with respect to in-house asset managers that is substantially similar to the relief provided in the proposed exemption. Deutsche Bank represented that it will comply with all such conditions.

One commentator expressed concern about the proposed exemption to the extent it allows a bank supervised under the laws of Germany to act as an in-house investment manager, asserting that current economic pressures will distract German authorities from adequately regulating such banks. Deutsche Bank responded that the Department has implicitly recognized the present capability of Germany authorities to adequately supervise banks subject to German law by recently granting exemptive relief (in many

different contexts) where the affected bank or other person is subject to supervision under German law. *See, e.g.*, PTE 2003–20, 68 Fed. Reg. 40689 (July 8, 2003); PTE 2003–12, 68 Fed. Reg. 34648 (June 10, 2003); PTE 2003–11, 68 Fed. Reg. 34646 (June 10, 2003); PTE 2002–48, 67 Fed. Reg. 62827 (Oct. 8, 2002); PTE 2002–31, 67 Fed. Reg. 42072 (June 20, 2002). Additionally, Deutsche Bank responded that the German authorities are actively focused on banking regulation. Last year, Germany adopted its Law on Integrated Financial Services Supervision (Gesetz ueber die integrierte Finanzaufsicht—FinDAG), pursuant to which the Federal Authority for Financial Services Supervision (Bundesanstalt fuer Finanzdienstleistungsaufsicht—BAFin) was established. The functions of the former offices for banking supervision (Gundesaufsichtsamt fuer das Kreditwesen—BAKred), insurance supervision (Bundesaufsichtsamt fuer das Versicherungswesen—BAV), and securities supervision (Bundesaufsichtsamt fuer den Wertpapierhandel—BAWe) have been combined in this single state regulator that supervises banks, financial services institutions, and insurance undertakings across the entire financial market and comprises all the key functions of consumer protection and solvency supervision. The BAFin was created to ensure a consistent regulation and supervision of the financial services and markets in Germany through one single authority.

Several commentators asked whether ERISA will continue to govern the plans and their in-house investment managers if the proposed exemption is granted. Deutsche Bank responded that ERISA will continue to govern its plans, that the in-house investment managers to which the proposed exemption applies will be subject to the same rules and regulations under ERISA that govern the plan currently, and that any foreign in-house managers can be sued in the United States. Deutsche Bank represented that it will fully comply with all laws respecting its plans.

Some commentators questioned whether the exemption is in the interest of plan participants. Deutsche Bank responded that, as reflected in the Notice, the exemption allows plans to take greater advantage of the investment management expertise and experience of Deutsche Bank, the world’s largest bank in terms of assets and one of the world’s largest asset managers, which will provide investment management services to the plans without a fee.

Several commentators requested general clarification of the proposed

exemption, and others expressed concern about conflicts of interest arising from in-house investment management. In response, Deutsche Bank stated that, under PTE 96–23, the Department has essentially granted the relief with respect to in-house asset managers that is provided in the proposed exemption. The only substantial difference between PTE 96–23 and the proposed exemption is that the proposed exemption allows the in-house adviser to be a bank supervised under the laws of the United States, a State, or Germany, rather than a registered investment adviser. Although such banks are not subject to registration under the Investment Advisers Act of 1940, they are experienced investment advisers and subject to adequate regulations by competent government authorities. Deutsche Bank also responded that the proposed exemption does not negate the legal protections of ERISA, including the requirement that investment managers discharge their duties with respect to the plans solely in the interest of the participants and beneficiaries.

Several commentators expressed concern, asked questions, or made recommendations with respect to their benefits, plan administration, or plan design. While these comments do not relate to the terms of the proposed exemption, Deutsche Bank represents that it will contact those commentators and attempt to address their issues.

One commentator requested that the exemption not be granted, but provided no basis for his position. Since the commentator provided no basis for his position, the Department believes that no response is necessary.

With respect to the requests for a hearing, the Department has determined that a public hearing is not necessary in this case because none of the interested persons requesting a hearing provided any substantive information justifying such request. In addition, the Department is satisfied that the exemption contains adequate independent safeguards to protect the interests of the plans and their participants and beneficiaries.

The Department has determined to modify section IV(h) of the final exemption as follows in order to provide consistency with PTE 96–23:

(h) the term “plan” means a plan maintained by the DBIM or an affiliate of the DBIM.

Accordingly, after giving full consideration to the entire record, including the comments by the commentators, and the responses of Deutsche Bank, the Department has determined to grant the exemption as

modified herein. In this regard, the comments submitted to the Department have been included as part of the public record of the exemption application. The complete application file, including all supplemental submissions received by the Department, is made available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Ave. NW, Washington DC 20210.

FOR FURTHER INFORMATION CONTACT:

Khalif Ford of the Department, telephone (202) 693-8540 (this is not a toll-free number).

The National Electrical Benefit Fund (the Plan) Located in Rockville, Maryland

[Prohibited Transaction Exemption No. 2003-37; Application No. D-11136] Exemption

The restrictions of sections 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code, shall not apply effective October 17, 2002 to Bank of America, N.A. (the Bank) providing a guaranty of repayment for the benefit of the bondholders in the form of an Irrevocable Direct Draw Letter of Credit No. 3051512 (Letter of Credit) and the Partnership's subsequent reimbursement to the Bank of amounts advanced by the Bank pursuant to the Letter of Credit in connection with the investment by the Plan in Colma Apartment Associates, L.P. (the Partnership). This exemption is conditioned upon the adherence to the material facts and representations described herein and upon the satisfaction of the following requirements:

(a) The Plan's investment in the Partnership is on terms no less favorable to the Plan than those which the Plan could obtain in arm's length transactions with unrelated parties;

(b) The decisions on behalf of the Plan to invest in the Partnership and consent to the terms of the reimbursement agreement in favor of the Bank are made by fiduciaries, which are not included among, and are independent of and unaffiliated with; the Bank;

(c) The investment in the Partnership represents no more than .5% of the total assets of the Plan; and

(d) The general partners of the Partnership are independent of the Plan and of the Bank of America.

(e) The Plan shall have no obligation to fund its capital contribution unless and until (i) all conditions imposed by

the construction lender regarding disbursement to the Partnership of \$25,950,000 of the tax-exempt bond construction financing proceeds have been satisfied by the Partnership; and (ii) the Department grants the proposed exemption; and

(f) The Plan's capital contribution will be used solely for the purpose of reimbursing Bank of America for the draw on the Letter of Credit.

EFFECTIVE DATE OF EXEMPTION: The effective date of this exemption is October 17, 2002.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the Notice of Proposed Exemption published on September 29, 2003 at 68 FR 56008.

FOR FURTHER INFORMATION CONTACT:

Khalif Ford of the Department, telephone (202) 693-8540 (this is not a toll-free number).

Aetna Life Insurance Company (Aetna) and UBS Realty Investors LLC UBS Realty) Located in Hartford, Connecticut

[Prohibited Transaction Exemption 2003-; Exemption Application No. D-11167]

Exemption

Section I—Exemption for Certain Transactions Involving the Management of Investments Shared by Two or More Accounts

The restrictions of certain sections of the Act and the sanctions resulting from the application of certain parts of section 4975 of the Code shall not apply to the following transactions if the conditions set forth in Section IV are met:

(a) *Transfers Between Accounts*—The restrictions of section 406(b)(2) of the Act shall not apply to the sale or transfer of an interest in a shared investment (including a shared partnership interest) between two or more Accounts (except the General Account), provided that each ERISA-Covered Account pays no more, or receives no less, than fair market value for its interest in a shared investment.

(b) *Joint Sales of Property*—The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the sale to a third party of the entire interest in a shared investment (including a shared partnership interest) by two or more Accounts, provided that each ERISA-Covered Account receives no less than

fair market value for its interest in the shared investment.

(c) *Additional Capital Contributions*—The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(b)(1)(A) through (E) of the Code, shall not apply either to the making of a proportionate equity capital contribution by one or more of the Accounts to a shared investment; or to the making of a Disproportionate [as defined in Section V(e)] equity capital contribution (or the failure to make such additional contribution) by the one or more of such Accounts which results in an adjustment in the equity ownership interests of the Accounts in the shared investment on the basis of the fair market value of such interests subsequent to such contribution, provided that each ERISA-Covered Account is given an opportunity to make a proportionate contribution.

(d) *Lending of Funds*—The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(a)(1)(A) through (E) of the Code, shall not apply to the lending of funds from the General Account to an ERISA-Covered Account to enable the ERISA-Covered Account to make an additional proportionate contribution, provided that such loan—

(A) Is unsecured and non-recourse plans;

(B) Bears interest at a rate not to exceed the prevailing rate on 90-day Treasury Bills;

(C) Is not callable at any time by the General Account; and

(D) Is prepayable at any time without penalty.

(e) *Shared Debt Investments*—In the case of a debt investment that is shared between two or more Accounts, including one or more of the ERISA-Covered Accounts:

(1) The restrictions of sections 406(a) and 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to any material modification in the terms of the loan agreement resulting from a request by the borrower or any decision regarding the action to be taken, if any, on behalf of the Accounts in the event of a loan default by the borrower;

(2) The restrictions of section 406(b)(2) of the Act shall not apply to any decision by Aetna or UBS Realty on behalf of one or more ERISA-Covered

Accounts: (A) Not to modify a loan agreement as requested by the borrower; or (B) to exercise any rights provided in the loan agreement in the event of a loan default by the borrower, even though the independent fiduciary for one of such Accounts has approved such modification or has not approved the exercise of such rights; and

(3) the restrictions of section 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply either to the proportionate acquisition of additional debt by one or more of the Accounts to a shared debt investment, or to the acquisition of Disproportionate additional debt (or the failure to acquire such additional debt) by one or more of such Accounts which results in an adjustment in the amount of debt held by the Accounts in the shared investment provided that each ERISA-Covered Account is given an opportunity to acquire additional debt on a proportionate basis.

Section II—Exemption for Certain Transactions Involving the Management of Partnership Interests Shared by Two or More Accounts

The restrictions of certain sections of the Act and the sanctions resulting from the application of certain parts of section 4975 of the Code shall not apply to the following transactions resulting from the sharing of an investment in a real estate partnership between two or more Accounts, if the conditions set forth in Section IV are met:

(a) *Additional Capital Contributions*—

(1) The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(a)(1)(A) through (E) of the Code, shall not apply either to the making of additional proportionate equity capital contributions by one or more Accounts participating in the partnership; or to the making of Disproportionate (as defined Section V(e)) equity capital contributions by one or more of such Accounts which results in an adjustment in the equity ownership interest of the Accounts in the shared partnership investment on the bases of the fair market value of such interests subsequent to such contributions; provided that each ERISA-Covered Account is given an opportunity to make a proportionate contribution.

(2) The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code,

by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the lending of funds from the General Account to an ERISA-Covered Account to enable the ERISA-Covered Account to make an additional proportionate capital contribution, provided that such loan—

(A) Is unsecured and non-recourse with respect to the participating plans, (B) bears interest at a rate not to exceed the prevailing rate on 90-day Treasury Bills,

(C) is not callable at any time by the General Account, and

(D) is prepayable at any time without penalty.

(3) The restrictions of section 406(b)(2) of the Act shall not apply to the making of Disproportionate additional equity capital contributions (or the failure to make such additional contributions) to the partnership by Accounts other than the General Account which result in an adjustment in the equity ownership interests of the ERISA-Covered Accounts in the partnership on the basis of the fair market value of such partnership interests subsequent to such contributions, provided that each ERISA-Covered Account is given an opportunity to provide its proportionate share of the additional equity capital contributions; and

(4) In the event a co-partner fails to provide all or any part of its proportionate share of an additional equity capital contribution, the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the making of Disproportionate additional equity capital contributions to the partnership by an Account up to the amount of such contribution not provided by the co-partner which result in an adjustment in the equity ownership interests of the Accounts in the partnership on the basis provided in the partnership agreement, provided that such ERISA-Covered Account is given an opportunity to participate in all additional equity capital contributions on a proportionate basis.

(b) *Third Party Purchase Offers*—(1) In the case of an offer by a third party to purchase any property owned by the partnership, the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the acquisition by the Accounts, including one or more ERISA-Covered

Account[s], on either a proportionate or Disproportionate basis of a co-partner's interest in the partnership in connection with a decision on behalf of such Accounts to reject such purchase offer, provided that each ERISA-Covered Account is first given an opportunity to participate in the acquisition on a proportionate basis; and

(2) The restrictions of section 406(b)(2) of the Act shall not apply to any acceptance by Aetna or UBS Realty on behalf of two or more Accounts, including one or more ERISA-Covered Account[s], of an offer by a third party to purchase a property owned by the partnership even though the independent fiduciary for one or more of such ERISA-Covered Account[s] has not approved the acceptance of the offer where all of the Accounts (other than the General Account) participating in such investment are not in agreement on how to proceed with respect to such offer, provided that the declining Account[s] are first afforded the opportunity to buy out both the co-partner and "selling" Account's interests in the partnership.

(c) *Rights of First Refusal*—(1) In the case of the right to exercise a right of first refusal described in a partnership agreement to purchase a co-partner's interest in the partnership at the price offered for such interest by a third party, the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the acquisition by such Account, including one or more ERISA-Covered Account[s], on either a proportionate or Disproportionate basis of a co-partner's interest in the partnership in connection with the exercise of such a right of first refusal, provided that each ERISA-Covered Account is first given an opportunity to participate on a proportionate basis; and

(2) The restrictions of section 406(b)(2) of the Act shall not apply to any decision by Aetna or UBS Realty on behalf of the ERISA-Covered Accounts not to exercise such a right of first refusal even though the independent fiduciary for one or more of such ERISA-Covered Accounts has approved the exercise of the right of first refusal where all of the Accounts participating in such investment (other than the General Account) are not in agreement on how to proceed with respect to such right of first refusal, provided that the Accounts that approved the exercise of the right of first refusal are offered the opportunity to buy-out the co-partner on their own.

(d) *Buy-Sell Options*—(1) In the case of the exercise of a buy-sell option set forth in the partnership agreement, the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the acquisition by one or more of the Accounts on either a proportionate or Disproportionate basis of a co-partner's interest in the partnership in connection with the exercise of such a buy-sell option, provided that each ERISA-Covered Account is first given the opportunity to participate on a proportionate basis; and

(2) The restrictions of section 406(b)(2) of the Act shall not apply to any decision by Aetna or UBS Realty on behalf of two or more Accounts, including one or more ERISA-Covered Account[s], to sell the interest of such Accounts in the partnership to a co-partner even though the independent fiduciary for one or more of such ERISA-Covered Account[s] has not approved such sale where all of the Accounts participating in such investment (other than the General Account) are not in agreement on how to proceed with respect to the buy-sell option, provided that such disapproving Account is first afforded the opportunity to purchase the entire interest of the co-partner.

Section III—Exemption for Transactions Involving a Partnership or Persons Related to a Partnership

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply, if the conditions in Section IV are met, to any additional equity or debt capital contributions to a partnership, or any transaction with the co-partner which arises in connection with the operation of the partnership, by an ERISA-Covered Account that is participating in an interest in the partnership, or to any material modification in the terms of, or action taken upon default with respect to, a loan to the partnership in which the ERISA-Covered Account has an interest as a lender, where the partnership is a party in interest solely by reason of the ownership on behalf of the General Account of a 50 percent or more interest in such joint venture.

Section IV—General Conditions

(a) The decision to participate in any ERISA-Covered Account that shares real estate investments must be made by plan fiduciaries who are totally

unrelated to Aetna, UBS Realty and their respective affiliates. This condition shall not apply to plans covering employees of Aetna, UBS Realty or any of their respective affiliates.

(b) Each contractholder or prospective contractholder in an ERISA-Covered Account which shares or proposes to share real estate investments is provided with a written description of potential conflicts of interest that may result from the sharing, a copy of the notice of pendency, and a copy of the exemption as granted.

(c) An independent fiduciary must be appointed on behalf of each ERISA-Covered Account participating in the sharing of investments. The independent fiduciary shall be either:

(1) A business organization which has at least five years of experience with respect to commercial real estate investments,

(2) A committee comprised of one or more individuals who each have at least five years of experience with respect to commercial real estate investments, or

(3) The plan sponsor (or its designee) of a plan (or plans) that is the sole participant in an ERISA-Covered Account.

(d) The independent fiduciary or independent fiduciary committee member shall not be or consist of Aetna, UBS Realty or any of their respective affiliates.

(e) No organization or individual may serve as an independent fiduciary for an ERISA-Covered Account for any fiscal year if the gross income (other than fixed, non-discretionary retirement income and any cost of living increases thereon) received by such organization or individual (or any partnership or corporation of which such organization or individual is an officer, director, or ten percent or more partner or shareholder) from Aetna, UBS Realty, any of their respective affiliates, and the ERISA-Covered Accounts for that fiscal year exceeds five percent of its or his annual gross income from all sources for the prior fiscal year. If such organization or individual had no income for the prior fiscal year, the five percent limitation shall be applied with reference to the fiscal year in which such organization or individual serves as an independent fiduciary. The income limitation will include income for services rendered to the Accounts as independent fiduciary under any prohibited transaction exemption(s) granted by the Department. However, such income limitation shall not include any income for services rendered to Single Customer ERISA-Covered Account by an independent fiduciary selected by the Plan Sponsor

to the extent determined by the Department in any subsequent prohibited transaction proceeding.

In addition, no organization or individual who is an independent fiduciary, and no partnership or corporation of which such organization or individual is an officer, director or ten percent or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from, Aetna, UBS Realty, any of their respective affiliates, or any Account managed by Aetna, UBS Realty or any of their respective affiliates, during the period that such organization or individual serves as an independent fiduciary and continuing for a period of six months after such organization or individual ceases to be an independent fiduciary, or negotiate any such transaction during the period that such organization or individual serves as independent fiduciary.

(f) The independent fiduciary acting on behalf of an ERISA-Covered Account shall have the responsibility and authority to approve or reject recommendations made by Aetna, UBS Realty or any of their respective affiliates for each of the transactions in this exemption. Aetna, UBS Realty and any of their respective affiliates shall involve the independent fiduciary in the consideration of contemplated transactions prior to the making of any decisions, and shall provide the independent fiduciary with whatever information may be necessary in making its determinations.

In addition, the independent fiduciary shall review on an as-needed basis, but not less than twice annually the shared real estate investments in the ERISA-Covered Account to determine whether the shared real estate investments are held in the best interest of the ERISA-Covered Account.

(g) Neither UBS Realty nor any of its affiliates is a co-investor in the shared investment or partnership to which an exemption provided by Sections I, II or III above is being applied; provided, however, that this condition shall not preclude an employee benefit plan maintained by Aetna, UBS Realty or any of their affiliates from participating in an ERISA-Covered Account that is such a co-investor.

(h) Aetna or UBS Realty maintains for a period of six years from the date of the transaction the records necessary to enable the persons described in paragraph (i) of this Section to determine whether the conditions of this exemption have been met, except that a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of

Aetna, UBS Realty or any of their respective affiliates, the records are lost or destroyed prior to the end of the six-year period.

(i) Except as provided in paragraph (2) of this subsection (i) and notwithstanding any provisions of subsection (a)(2) and (b) of section 504 of the Act, the records referred to in subsection (h) of this Section are unconditionally available at their customary location for examination during normal business hours by—

(A) Any duly authorized employee or representative of the Department or the Internal Revenue Service,

(B) Any fiduciary of a plan participating in an ERISA-Covered Account who has authority to acquire or dispose of the interests of the plan, or any duly authorized employee or representative of such fiduciary,

(C) Any contributing employer to any plan participating in an ERISA-Covered Account or any duly authorized employee or representative of such employer, and

(D) Any participant or beneficiary of any plan participating in an ERISA-Covered Account, or any duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in subparagraphs (B) through (D) of this subsection (i) shall be authorized to examine trade secrets of Aetna, UBS Realty or any of their respective affiliates, or commercial or financial information which is privileged or confidential.

(j) Given that this exemption is a replacement to a previous prohibited transaction exemption (see PTE 91-10, 56 FR 3273, January 29, 1991) any approvals, appointments, disclosures, and decisions made or given pursuant to PTE 91-10 shall remain in full force and effect with respect to this replacement exemption.

Section V—Definitions

For the purposes of this exemption: (a) An “affiliate” of Aetna or UBS Realty, respectively includes—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with Aetna or UBS Realty, respectively.

(2) Any officer, director or employee or Aetna, UBS Realty or any person described in section V(a)(1), and

(3) Any partnership in which Aetna or UBS Realty is a partner.

(b) An “Account” means any account maintained by Aetna and, except in the case of the General Account, managed by UBS Realty. The term “Account” includes the General Account, ERISA-

Covered Accounts, Pooled Accounts and Single Customer Accounts, as well as combinations of accounts other than the General Account which are consolidated for investment management purposes as if they were a single account.

(c) The “General Account” means the general asset account of Aetna and any of its affiliates which are insurance companies licensed to do business in at least one State as defined in section 3(10) of the Act.

(d) An “ERISA-Covered Account” means any Account (other than the General Account) in which employee benefit plans subject to Title I or Title II of the Act participate.

(e) “Disproportionate” means not in proportion to an Account’s existing equity ownership interest in an investment, partnership or partnership interest in a debt.

(f) The “Transition Effective Date” is the effective date of the delegation by Aetna to UBS Realty of the management of the Accounts, which has been designated as October 1, 2003.

Effective Date: This exemption is effective as of October 1, 2003, the Transition Effective Date.

For a more complete statement of the facts and representations supporting the Department’s decision to grant this exemption refer to the notice of proposed exemption published on September 29, 2003, at 68 FR 55993.

Comments and Modification: In response to a request made by the applicant, the Department has added a condition to the exemption (see Section IV (j)) stating that any approvals, appointments, disclosures, and decisions made or given pursuant to the prior exemption for Aetna (*i.e.*, PTE 91-10) shall remain in full force and effect with respect to this exemption. In this regard, the applicant represents that the appropriate plan fiduciaries for ERISA-Covered Accounts were informed that any approvals, appointments, disclosures and decisions made or given pursuant to PTE 91-10 shall remain in full force and effect after the date that this exemption is published in the **Federal Register**. In addition, as noted in the notice of proposed exemption (see 68 FR at 55994, column one, last sentence of paragraph 1 of the Summary of Facts and Representations), PTE 91-10 shall be superseded and replaced by this exemption for all transactions entered into after the Transition Effective Date.

No other written comments, and no requests for a public hearing, were received by the Department. Accordingly, the Department has

decided to grant the exemption as modified.

FOR FURTHER INFORMATION CONTACT: Brian J. Buyniski of the Department, at telephone (202) 693-8545. (This is not a toll-free number).

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 12th day of December, 2003.

Ivan Strasfeld,

*Director of Exemption Determinations,
Employee Benefits Security Administration,
Department of Labor.*

[FR Doc. 03-31103 Filed 12-16-03; 8:45 am]

BILLING CODE 4510-29-M

NATIONAL COUNCIL ON DISABILITY

Sunshine Act Meetings

TIMES AND DATES: 8:30 a.m.–5 p.m.,
February 8–February 9, 2004.

PLACE: Wyndham Bonaventure Resort & Spa, 250 Racquet Club Road, Fort Lauderdale, Florida.